

Decisions of Interest

MARCH 20, 2023

CRIMINAL

COURT OF APPEALS

People v Regan | March 16, 2023

CONSTITUTIONAL SPEEDY TRIAL | UNJUSTIFIABLE DELAY | INDICTMENT DISMISSED

The defendant appealed from a Third Department order affirming his conviction of 1st degree rape after a jury trial. The Court of Appeals reversed and dismissed the indictment. The People's inexplicable 31-month preindictment delay in obtaining a warrant for the defendant's DNA to compare against a sample recovered from the complainant violated the defendant's right to a prompt prosecution. The People obtained all of the non-DNA evidence they used at trial almost immediately. The complainant reported that the defendant raped her a few hours after the incident and submitted to an evidence collection exam the same day. The police interviewed the defendant the day of the incident; he denied having sex with the complainant and refused to provide a DNA sample. Approximately eight months later, the police learned that unidentified male DNA was found in the samples collected from the complainant. However, the People did not seek a warrant for the defendant's DNA until 38 months after the initial complaint. Judges Singas and Garcia dissented. Matthew Hug represented the appellant.

[People v Regan \(2023 NY Slip Op 01353\)](#)

People v Guerra | March 16, 2023

DISSENT | MILLER RULE | MISGUIDED AND OBSOLETE

The defendant appealed from a First Department order affirming his conviction of 2nd degree assault after a jury trial. The Court of Appeals affirmed. Supreme Court properly prohibited the jury from considering the violent conduct underlying the complainant's four prior YO adjudications, of which the defendant was unaware, as proof that the complainant was the initial aggressor (see *People v Watson*, 20 NY3d 1018 [2013]; *People v Miller*, 39 NY2d 543 [1976]; *People v Rodawald*, 177 NY 408 [1904]). Judges Wilson and Rivera dissented, contending that the *Rodawald / Miller* exclusionary rule is "misguided and obsolete." Supreme Court unsealed two of the complainant's YOs and allowed the jury to consider them to evaluate his credibility, but not to determine who was the initial aggressor. However, the complainant was not on trial and his statutory interest in confidentiality—which had already been diminished by unsealing two of his YOs—paled in comparison to the defendant's Constitutional right to a fair trial and to present a complete justification defense. Most other jurisdictions permit character evidence, even if unknown to the defendant at the time, to show that a victim was the initial aggressor. New

York's exclusionary rule should be modified to allow the introduction of exculpatory propensity evidence when a defendant is entitled to a justification charge and there is a dispute as to who was the first aggressor.

[People v Guerra \(2023 NY Slip Op 01352\)](#)

FIRST DEPARTMENT

People v Jones | March 14, 2023

GUILTY PLEA | SUPPRESSION | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 3rd degree CPCS and 2nd degree CPW based on his guilty plea. The First Department reversed. The trial court should have granted the defendant's suppression motion. Although the officers executing the arrest warrant identified themselves as police before entering the apartment, they did not give notice of their purpose before entering (see CPL 120.84 [4]). The Office of the Appellate Defender (Rebecca Besdin, of counsel) represented the appellant.

[People v Jones \(2023 NY Slip Op 01262\)](#)

People v Woody | March 14, 2023

MOLINEUX ERROR | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 2nd and 3rd degree burglary and resisting arrest after trial. The First Department reversed. The trial court erred by allowing the People to admit evidence of the defendant's prior gun conviction to explain the reporting officer's belief that the defendant was armed and why 100 officers responded to the scene after he fled. The defendant did not open the door to evidence of his prior gun conviction (see *People v Santana*, 16 AD3d 346, 346 [1st Dept 2005]), and it was not necessary as background information or to complete the narrative. Other, less prejudicial evidence was available—the defendant's parole arrest warrant, a visible bulge in the defendant's pocket consistent with a firearm, and his attempt to flee. Proof of the defendant's prior conviction served no additional purpose other than to prejudice the defendant; the error was not harmless. The Office of the Appellate Defender (Joseph M. Nursey, of counsel) represented the appellant.

[People v Woody \(2023 NY Slip Op 01263\)](#)

SECOND DEPARTMENT

People v Brown | March 15, 2023

PEOPLE'S APPEAL | 30.30 DISMISSAL | AFFIRMED

The People appealed from a Rockland County Court order that granted the defendant's CPL 30.30 motion, dismissed the indictment, and denied the People's motion for an extension of time to serve and file a late COC. The Second Department affirmed. The People's statement of readiness, made within the speedy trial time limit, was illusory because they did not file a COC. Defense counsel did not allege that any discovery was missing but, because the People never filed a COC, dismissal of the indictment was

warranted. James D. Licata (Ellen O'Hara Woods, of counsel), represented the respondent.

[People v Brown \(2023 NY Slip Op 01306\)](#)

People v Graubard | March 15, 2023

CPL 440.46-A | CONVICTION SUBSTITUTION | REMANDED

The defendant appealed from a Dutchess County Court order that granted his CPL 440.46-a motion, vacated his 1st degree criminal possession of marijuana conviction, and replaced it with a conviction for 1st degree criminal possession of cannabis. The Second Department reversed and remanded. While County Court had the authority to replace the vacated Article 221 conviction with an Article 222 conviction, the court erred by failing to consider, as required by statute, whether substituting a conviction for a lesser offense was in the interest of justice (see CPL 440.46-a [2] [b] [iii]). MRTA Law, P.C. (Wei Hu, of counsel) represented the appellant.

[People v Graubard \(2023 NY Slip Op 01308\)](#)

FOURTH DEPARTMENT

People v Suttles | March 17, 2023

SUPPRESSION | VISUAL SPEED ESTIMATE | INDICTMENT DISMISSED

The defendant appealed from an Erie County Supreme Court judgment convicting him of 2nd degree CPW based on his guilty plea. The Fourth Department vacated the plea, granted the defendant's suppression motion, and dismissed the indictment. Two officers testified that they visually estimated the vehicle in which the defendant was a passenger to be traveling at approximately 40-45 mph in a 30-mph zone. Although a qualified officer's testimony about a visually estimated speed may be sufficient, the People here failed to establish the officers' qualifications to support their estimates. Because the People failed to prove the legality of the stop, the physical evidence seized because of the traffic stop must be suppressed. One justice dissented. Jonathan Rosenberg represented the appellant.

[People v Suttles \(2023 NY Slip Op 01380\)](#)

People v Davis | March 17, 2023

PHYSICAL INJURY | INSUFFICIENT EVIDENCE

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree burglary, 3rd degree assault (2 counts), and criminal obstruction of breathing after a jury trial. The Fourth Department modified and dismissed one of the assault convictions. The People's proof that the complainant sustained physical injury relevant to that count was legally insufficient. The Monroe County Public Defender (Brian Shiffrin, of counsel) represented the appellant.

[People v Davis \(2023 NY Slip Op 01393\)](#)

People v Dowdell | March 17, 2023

SUBSTANTIAL PAIN | PHYSICAL INJURY | INSUFFICIENT EVIDENCE

The defendant appealed from a Cayuga County Court judgment convicting him of 2nd degree assault and 1st and 2nd degree promoting prison contraband after a nonjury trial. The Fourth Department modified in the interest of justice and dismissed the assault conviction. The People's proof that the complainant experienced substantial pain, and therefore physical injury, was legally insufficient. The complainant never testified to the degree of pain he experienced, and the injury only resulted in slight scratches, redness, minor swelling, and possible minor bruising. David P. Elkovich represented the appellant. [People v Dowdell \(2023 NY Slip Op 01432\)](#)

People v Case | March 17, 2023

RESTITUTION REDUCED | EXCLUDED EXPENSES

The defendant appealed from a Genesee County Court order that directed her to pay \$24,469 as restitution to the complainant, her former employer, and its insurance carrier. The Fourth Department modified and reduced the amount of restitution payable to the complainant to \$1,000—its insurance deductible payment. Labor costs for the complainant's employees to investigate the offense were "consequential financial losses," not "actual out-of-pocket losses" where the conviction was not for identity theft (see Penal Law § 60.27 [1]), and travel expenses for employees who testified at trial were not compensable as restitution. The Legal Aid Bureau of Buffalo (Leah N. Farwell, of counsel) represented the appellant. [People v Case \(2023 NY Slip Op 01438\)](#)

People v Gaskin | March 17, 2023

30.30 MOTION | INCORRECT STANDARD | REMANDED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree CPW (2 counts) and 3rd and 4th degree CPCS based on his guilty plea. The Fourth Department reserved decision and remitted. Supreme Court applied the incorrect standard in denying the defendant's CPL 30.30 motion. Six months after the People filed their COC and SOR, defense counsel moved to dismiss because the People's failure to provide all statutorily required discovery rendered their COC illusory. Supreme Court denied the motion solely because the defendant did not establish that he had been prejudiced by the late disclosure. Easton Thompson Kasperek Shiffrin LLP (Brian Shiffrin, of counsel) represented the appellant. [People v Gaskin \(2023 NY Slip Op 01415\)](#)

People v Ross | March 17, 2023

CONSTRUCTIVE POSSESSION | JURY CHARGE | REVERSED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd and 3rd degree CPW. The Fourth Department reversed. The trial court erred in granting the People's request for a constructive possession jury charge. The defendant dropped the gun while he was being pursued by police on foot. There was no view of the evidence from which a jury could have concluded that the defendant constructively possessed the handgun. The error was not harmless because it was unclear whether the

verdict was based on the defendant's actual or constructive possession of the gun. Danielle C. Wild represented the appellant.

[People v Ross \(2023 NY Slip Op 01381\)](#)

People v Parilla | March 17, 2023

MISTRIAL | DOUBLE JEOPARDY | AFFIRMED

The defendant appealed from an Erie County Supreme Court judgment convicting him of 3rd degree CPCS (two counts), 4th degree CPCS, and 5th degree CPCS. The Fourth Department affirmed. The defendant's first bench trial ended in a mistrial after the final witness disclosed that the defendant had previously suggested to her that the presiding judge had engaged in improprieties off the bench. The judge denied the allegations but declared a mistrial on his own motion. The judge had been placed in the untenable position of being required to assess the credibility of a witness who had made "a spurious allegation" against him. Because the mistrial was justified by manifest necessity, the second trial was not barred by double jeopardy.

[People v Parilla \(2023 NY Slip Op 01446\)](#)

TRIAL COURTS

People v Nieves | 2023 WL 2469892

CPL 30.30 | DEFECTIVE INFORMATION | SOR INVALID

The defendant filed a CPL 30.30 motion seeking dismissal of an information charging him with three offenses, alleging that the People's SOR was invalid because the accusatory information was defective. Queens County Criminal Court granted the motion. The information was defective. It failed to allege acts establishing every element of two of the offenses and it included every subdivision of the third offense—all of which contain different elements—making it impossible to determine the specific crime charged. The People could not validly state trial readiness on a defective information. The Legal Aid Society of NYC (Allen Popper, of counsel) represented the defendant.

[People v Nieves \(2023 NY Slip Op 50182\[U\]\)](#)

People v Sanders | 2023 WL 2518360

CPL 30.30 | DEFECTIVE INFORMATION | SOR INVALID

The defendant filed a CPL 30.30 motion challenging the validity of the People's COC and supplemental COC. New York County Criminal Court granted the motion. The People failed to disclose all records related to unsubstantiated and substantiated misconduct of their police witnesses. Their request for these items, made on the last day of chargeable time and one minute before they filed their COC and SOR, did not demonstrate good faith or due diligence. The Legal Aid Society of NYC (Shana Knizhnik, of counsel) represented the defendant.

[People v Sanders \(2023 NY Slip Op 50190\[U\]\)](#)

FAMILY

FIRST DEPARTMENT

Matter of C.L. (Edward L.) | March 14, 2023

DERIVATIVE NEGLECT | MODIFIED | DISMISSED

The father and the older child separately appealed from a Bronx County Family Court order which found that the father neglected the younger child and derivatively neglected the older child. The First Department modified by vacating the finding of derivative neglect and dismissed the older child's appeal. The finding of derivative neglect was based entirely on excessive corporal punishment of the younger child. The incident took place outside of the home and there was no evidence that the older child was even aware it had occurred. There was no evidence that the older child was ever treated similarly or that he was at risk of becoming impaired. Because the older child was not aggrieved by the finding of derivative neglect against the father, and he was no longer a minor, dismissal was required. Daniel X. Robinson represented the father.

[Matter of C.L. \(Edward L.\) \(2023 NY Slip Op 01260\)](#)

SECOND DEPARTMENT

Matter of McCabe v Truglio | March 15, 2023

VISITATION MODIFICATION | HEARING REQUIRED | REMANDED

The mother appealed from an Orange County Family Court order that summarily dismissed her petition seeking to modify the visitation provisions of a prior order to allow her unsupervised visitation. The Second Department reversed and remanded. The record showed that factual disputes existed which required a hearing. Family Court erroneously relied on a report of a forensic evaluator that had not been admitted into evidence, and the parties did not have the chance to test the evaluator's opinions and credibility. Geoffrey E. Chanin represented the mother.

[Matter of McCabe v Truglio \(2023 NY Slip Op 01299\)](#)

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